

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>PAUL M. DECK, SR.,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Petitioner</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>HENRY VARNER, SUPERINTENDENT, et al.,</b>	:	
	:	
<b>Respondents</b>	:	<b>NO. 99-4818</b>

**Reed, J.**

**November 8th, 2001**

**MEMORANDUM**

Pending before the Court is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by petitioner Paul M. Deck (Document No. 1), who is currently incarcerated at State Correctional Institution in Dallas, Pennsylvania. Petitioner alleges that his procedural due process rights were violated through the ineffective assistance of trial counsel, appellate counsel, counsel under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S. §§ 9541 et seq., and through the general failure of the state court system to remedy petitioner's issues. Pursuant to 28 U.S.C. § 636 and Local Rule of Civil Procedure 72.1.I(b), the petition was referred to the United States Magistrate Judge for a report and recommendation.

On September 25, 2000, Magistrate Judge M. Faith Angell filed a Report and Recommendation (Document No. 22) in which she recommended that the petition be denied and dismissed without an evidentiary hearing, and that petitioner's motion for leave to amend his petition be denied. Petitioner filed objections to the Report and Recommendation (Document No. 26), alleging that the magistrate judge erred by failing to address various facts and arguments raised in his Traverse to the Commonwealth's False Return. In accordance with 28 U.S.C. §

636(b)(1) and the Local Rules of Civil Procedure, this Court has proceeded to review the entire record and determine the alleged objectionable portions of the Report and Recommendation de novo.

### **A. Background**

The procedural history as summarized in the Report and Recommendation is as follows:<sup>1</sup> On March 11, 1988, petitioner was convicted in the Pennsylvania criminal court of robbery and possession of an instrument of crime, and was sentenced on September 7, 1988 to imprisonment for a total of twenty-two and one-half to forty-five years. Petitioner filed a timely direct appeal of this conviction to the Superior Court of Pennsylvania, raising the following claims of error: (1) the prosecutor's comments about the victims' rights threatened the jury's objectivity and was reversible error; (2) the prosecutor committed reversible error in asking the defendant if he knew his sister had told the police that defendant had shown her a gun on the day of the robbery; (3) the prosecutor committed reversible error in reminding appellant that he did not want to talk to the investigating detective and in questioning the detective about the sparse information offered by the defendant; (4) the trial court committed reversible error in failing to properly charge an alibi defense; and (5) trial counsel was ineffective in failing to request a proper alibi charge and in not excepting to the trial court's failure to do so. These claims were considered and rejected by the Superior Court of Pennsylvania on November 16, 1989. Mr. Deck's application for allocatur in the Supreme Court of Pennsylvania on all of the claims presented to the Superior Court was denied on August 29, 1990.

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<sup>1</sup> Petitioner acknowledges that the Report and Recommendation accurately recites the procedural background of this case. (Petitioner's Objections at p. 3.)

On October 2, 1992, Mr. Deck filed a petition for collateral relief under the PCRA. After being appointed counsel, Mr. Deck filed an amended PCRA petition on September 17, 1996, which included the following claims for relief: (1) trial counsel was ineffective for failing to conduct a proper investigation; (2) trial counsel was ineffective for failing to subpoena Art Goldberg; and (3) trial counsel was ineffective for failing to attempt to suppress the testimony of Ralph Delvacchio. On July 23, 1997, the PCRA court denied the request for post-conviction relief. Upon appeal of the PCRA decision, the Superior Court held on January 11, 1999, that the ineffective assistance of counsel claims were waived due to petitioner's failure to raise them on direct appeal, and were in any event without merit. Mr. Deck's application for allocatur in the Supreme Court of Pennsylvania was denied on June 22, 1999.

On September 28, 1999, Mr. Deck filed the instant habeas petition, claiming the following grounds for relief: (1) ineffective assistance of trial counsel for (a) failing to call Art Goldberg as a witness; (b) improperly moving the court in a suppression hearing to exclude certain testimony of Ralph Delvacchio that was favorable to the defense; and (c) failing to object to the Commonwealth's closing argument that was based upon evidence not of record; (2) ineffective assistance of appellate counsel for failing to raise issues of merit and failing to confer with petitioner regarding the contents of the brief filed in the Superior Court on direct appeal; (3) ineffective assistance of PCRA counsel, when counsel "deliberately and purposely sabotaged Petitioner's PCRA issues;" and (4) the "State Court as a system failed to remedy Petitioner's issues."

## **B. Report and Recommendation**

The magistrate judge in her Report and Recommendation concludes that petitioner's claims are procedurally defaulted or are otherwise not cognizable in this forum. When a prisoner fails to raise his federal claim at the proper time and is thereby barred from raising it at a later date, this procedural default constitutes an independent and adequate state ground for the continued imprisonment of the petitioner. See Edwards v. Carpenter, U.S. 446, 451, 120 S. Ct. 1587 (2000). A petitioner who failed to meet the state's procedural requirements must demonstrate cause for the procedural default and prejudice therefrom before a federal court may consider his claims. See id. at 451. In assessing petitioner's appeal of the denial by the PCRA court of his ineffective assistance of trial counsel claims, the Superior Court concluded that because petitioner had failed to raise the claims on direct appeal, they had consequently been waived. See Commonwealth v. Deck, No. 3504, Philadelphia 1997, the January 11, 1999 Opinion. Although petitioner argues that his claims of ineffective assistance of appellate counsel constitute cause for the procedural defect, the magistrate judge found that petitioner failed to provide sufficient evidence to support this claim, and thus petitioner failed to prove cause sufficient to overcome the procedural bar. (Report & Recommendation at p. 9.)

The magistrate judge further concluded that claims of ineffective assistance of counsel in post-conviction proceedings like those under the PCRA are not cognizable under the dictates of the federal habeas statute. (Id. at p. 10.) Finally, the magistrate judge determined that petitioner failed to present any evidence sufficient to entitle him to federal habeas relief based on his claim of a denial of a state remedy. (Id. at 11.)

## C. Objections

### 1. Standard of Review

Plaintiff alleges that the magistrate judge applied an incorrect standard of review in the Report and Recommendation by ignoring the citation in petitioner's Traverse to Bartone v. United States, 375 U.S. 52, 84 S. Ct. 21 (1963). (Petitioner's Objections at p. 2.) Petitioner's reliance upon Bartone is misplaced. The case stands for the proposition that, where possible, it is more appropriate for a federal court to correct an error upon appeal rather than through collateral proceedings. See id. at 54. Specifically, the opinion states, in pertinent part:

Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding. But the situation is different in federal proceedings, over which both the Courts of Appeal and this Court have broad powers of supervision. It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding.

Id. (citations omitted). Bartone does not purport to set forth any standard of federal review over state post-conviction procedures, and is otherwise inapposite to the instant petition. Moreover, petitioner has not alleged any facts to support an allegation that petitioner had faced "state procedural snarls or obstacles [that] preclude[d] an effective state remedy against unconstitutional convictions. . . ." Id. Accordingly, petitioner has failed to show that the magistrate judge applied an incorrect standard of review with regard to petitioner's claims.

## **2. Claim of Ineffective Counsel as Cause for Procedural Default**

Mr. Deck also objects to the conclusion of the magistrate judge that petitioner was procedurally barred from raising claims of ineffectual trial counsel as grounds for habeas relief. He argues that this conclusion ignores the argument in his Traverse that ineffective assistance of trial, appellate, or post-conviction counsel may serve as a cause for procedural default sufficient to warrant habeas relief. (Petitioner's Objections at p. 2.) A prisoner who has failed to meet the state court's procedural requirements for presenting his federal claims must demonstrate cause for the default, and prejudice therefrom, before a federal habeas court will consider the merits of that claim. See Edwards, 529 U.S. at 451. The ineffective assistance of counsel claim itself must have been properly exhausted in the state courts to serve as cause of default of a federal claim. See id. at 451-52. If the ineffective assistance of counsel claim is also procedurally barred for failure to exhaust, the prisoner must satisfy the cause and prejudice standard for the ineffective assistance of counsel claim before it may serve as cause for defaulting on the initial federal claim. See id. at 453.

Petitioner asserts a claim of ineffective assistance of trial counsel as grounds for habeas relief, and argues he had ineffective assistance of appellate counsel as the cause for the default of the ineffective trial counsel claim. A review of the Report and Recommendation reveals that, in contrast to Petitioner's objection, the magistrate judge did not conclude that ineffective assistance of appellate counsel cannot serve as cause for default of a ineffective trial counsel claim. Instead, the magistrate judge found that petitioner presented insufficient evidence to support his claim of ineffective assistance of appellate counsel. (Report & Recommendation at pp. 7-9.) Accordingly, petitioner failed to satisfy the cause and prejudice standard for the

procedural default of his claim of ineffective trial counsel.

### **3. Previous Assertion of Ineffective Assistance of Trial Counsel**

Petitioner additionally objects to the finding that the claims of ineffective assistance of trial counsel were raised for the first time in the PCRA forum. (Petitioner's Objections at p. 3.) He argues that this claim was presented to the trial court prior to his direct appeal, and was orally presented at the hearings before the appellate courts on direct appeal. (*Id.* at 5.) With regard to petitioner's argument that his claim was presented to the trial court, the Report and Recommendation provides that although Mr. Deck raised claims of ineffective assistance of trial counsel in post-verdict motions, these claims were considered on the merits and rejected by the trial court, and were not raised on direct appeal. (Report & Recommendation at p. 9.)

Petitioner's argument that the claims of ineffective trial counsel were orally presented to the appellate courts on direct appeal is raised for the first time in his objections, and is absent from both Mr. Deck's petition and his Traverse. Moreover, the argument directly contradicts the findings of the Superior Court of Pennsylvania, which stated that petitioner had failed to raise these claims on direct appeal. See Commonwealth v. Deck, No. 3504, Philadelphia 1997, the January 11, 1999 Opinion. State court findings are presumptively correct, and must be rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). Petitioner has presented no documentary evidence to support his claim that he raised these claims on direct appeal. Consequently, these claims are procedurally barred from habeas review.

#### 4. Determination of Claims on Merits by Superior Court

Petitioner further objects to the finding that the Superior Court of Pennsylvania had reviewed and dismissed the claims of ineffective trial counsel on their merits, arguing that the Court had determined the issues of law in a way that were contrary to and an unreasonable application of federal legal principles. (Petitioner's Objections at p. 6.) An application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the resulting decision was contrary to or involved an unreasonable application of clearly established federal law pursuant to the United States Supreme Court. See 28 U.S.C. § 2254(d)(1). Petitioner fails to specify what federal legal principles were allegedly controverted by the conclusions of the Pennsylvania Superior Court, and a review of the Superior Court Opinion reveal no improper standards nor application of law.<sup>2</sup> Moreover, the dismissal of the claims of ineffective assistance of counsel was based not only on the merits, but also on waiver. Consequently, petitioner's objections to the dismissal of his claims by the Superior Court on their merits are unavailing.

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<sup>2</sup> In addition to concluding that Mr. Deck had waived his ineffective assistance of counsel claims, the Superior Court analyzed petitioner's ineffective trial counsel claims on their merits. See Commonwealth v. Deck, No. 3504, Philadelphia 1997, the January 11, 1999 Opinion. Mr. Deck's first claim that trial counsel was ineffective for failure to investigate was dismissed as a boilerplate allegation insufficient to support post-conviction relief. See id. at p. 3. His second claim of ineffective trial counsel for failure to subpoena two eye-witnesses and petitioner's co-defendant was dismissed because (1) petitioner had failed to provide the affidavits necessary to establish the existence of the witnesses and the substance of their proposed testimony, and (2) any testimony that the witnesses could have provided would not have been exculpatory. See id. at pp. 3-4. Mr. Deck's third claim of ineffective trial counsel for suppressing the testimony of Ralph Delvacchio, a witness to the crime, was dismissed as inaccurate; the Superior Court noted that the testimony was not suppressed and Mr. Delvacchio in fact identified petitioner at trial. See id. at pp. 4-5. Mr. Deck's final claim of ineffective assistance of counsel for failure to introduce a police composite sketch of the robbery suspect was dismissed as petitioner had not produced a copy of the sketch for the Court's evaluation, and because petitioner's allegation that the sketch resembled his co-defendant would not be exculpatory. See id. at p. 5.



## **5. Ineffective Assistance of PCRA Counsel**

Petitioner objects to the conclusion of the magistrate judge that petitioner's claims of ineffective assistance of PCRA counsel are not cognizable in the federal habeas forum. (Petitioner's Objections at p. 7.) Under the statute authorizing federal district courts to entertain applications of state prisoners for writs of habeas corpus, the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings cannot be grounds for habeas relief. See 28 U.S.C. § 2254(i). Accordingly, the magistrate judge's conclusions regarding petitioner's claims of ineffective PCRA counsel do not "forget the role of the federal district court in § 2254 cases," (Petitioner's Objections at p. 7), but instead adheres to the clear boundaries established by the federal statute. In any event, petitioner's claims of ineffective assistance of PCRA counsel would not have overcome the magistrate judge's finding that petitioner had failed in the instant petition to prove cause and prejudice of the procedural default of his ineffective assistance of trial counsel.

## **6. Fundamental Miscarriage of Justice**

Petitioner argues that his claims should be considered despite the state procedural bar because failure to do so will result in a "fundamental miscarriage of justice." (Petitioner's Objections at pp. 7-8.) The "fundamental miscarriage of justice" exception to the general rule in habeas cases respecting independent and adequate state grounds is available only in extraordinary cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent. . . ." See Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639 (1986). Moreover, as the Report and Recommendation explains, a bare allegation of actual innocence is insufficient; petitioner must show that "it is more likely than not that no reasonable juror would

have convicted him in light of the new evidence’ presented in his habeas petition.” (Report & Recommendation at p. 9 (citing Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489 (1998).) Petitioner has not explained, and this Court cannot derive, any reason or evidence that even addresses this standard. Petitioner has thus failed to meet this burden of proof on this issue as a matter of law.

#### **7. “Firmly Established and Regularly Followed” State Rule**

Petitioner also asserts that his claims should be considered despite the procedural bar because Rule 1504 (now 234 Pa. Code Rule 904), the state rule providing for assistance of counsel in PCRA proceedings, was not “firmly established and regularly followed.” (Petitioner’s Objections at pp. 8-10.) Where the state procedural rule barring a petitioner’s federal claims was not “firmly established and regularly followed,” a federal district court may consider the claims for habeas purposes. See Ford v. Georgia, 498 U.S. 411, 423-24, 111 S. Ct. 850 (1991). Petitioner fundamentally misunderstands this exception to the general rule in habeas cases respecting independent and adequate state grounds for continued imprisonment. The rule providing for assistance of counsel in PCRA proceedings is not the state procedural rule barring review of petitioner’s claims. Accordingly, even accepting as true petitioner’s bald allegations that this rule was not “firmly established and regularly followed,” petitioner’s procedurally defaulted claims of ineffective counsel would still not qualify for habeas review.

## **8. Denial of State Remedy**

Finally, petitioner objects generally to the magistrate judge's conclusion that the unspecified claim of a denial of a remedy in the state appellate courts is not reviewable. Petitioner provides no arguments or grounds for his objections, but reiterates the specious argument from his Traverse that the failure of the state courts to rule in his favor on the claims of ineffective assistance of counsel denied the petitioner his right to a direct appeal. Any finding of fact by a state court is presumed correct, unless rebutted by the petitioner with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). Applications for writs of habeas corpus will only be granted to state prisoners when the state court adjudications resulted in decisions that were contrary to, or an unreasonable application of, Supreme Court precedent. See 28 U.S.C. § 2254(d)(1). The magistrate judge properly concluded that petitioner provided insufficient evidence to rebut the presumption of correctness applicable to the findings of fact by the state courts, and failed to meet the standard of proving that the state court decisions were contrary to or an unreasonable application of Supreme Court precedent. (Report & Recommendation at pp. 11-12.) Consequently, petitioner's general and conclusory allegation of an ineffective state remedy do not provide grounds for habeas relief.

## **D. Conclusion**

For the reasons stated above, as well as this Court's independent de novo review of the entire record, this Court will approve and adopt the Report and Recommendation of the magistrate judge and deny the instant petition for writ of habeas corpus as a matter of law. Petitioner has raised no factual issue that requires a hearing to resolve.

An appropriate Order follows.

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<b>Petitioner</b>	:	
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<b>v.</b>	:	
	:	
<b>HENRY VARNER, SUPERINTENDENT, et al.,</b>	:	
	:	
<b>Respondents</b>	:	<b>NO. 99-4818</b>

**ORDER**

**AND NOW**, this 8<sup>th</sup> day of November, 2001, upon consideration of the Petition for Writ of Habeas Corpus (Doc. No. 1), the response thereto (Doc. No. 16), the Traverse filed by petitioner Paul M. Deck (Doc. No. 21), the Report and Recommendation of M. Faith Angell, United States Magistrate Judge, (Doc No. 22), and the Objections to the Report and Recommendation filed by petitioner (Doc. No. 26), and upon review of the record de novo and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that:

1. The Objections of petitioner are **OVERRULED**.
2. The Report and Recommendation is **APPROVED AND ADOPTED**.
3. The petition for a writ of habeas corpus is **DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING**.
4. Petitioner's "Motion for Leave to Amend" is **DENIED**.

There is no probable cause to issue a certificate of appealability pursuant to 28 U.S.C. § 2253 because petitioner has failed to make a substantial showing of the denial of a constitutional right.

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**LOWELL A. REED, JR., S.J.**